

AMENDED IN ASSEMBLY APRIL 6, 2005

CALIFORNIA LEGISLATURE—2005—06 REGULAR SESSION

**ASSEMBLY BILL**

**No. 535**

**Introduced by Assembly Member Calderon**

February 16, 2005

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An act to amend Section 12100 of, to add Division 3.5 (commencing with Section 12500) to, and to repeal Section 12104 of, the Financial Code, relating to credit counselors.

LEGISLATIVE COUNSEL'S DIGEST

AB 535, as amended, Calderon. Licensure of credit counselors.

Existing law, the Check Sellers, Bill Payers and Proraters Law, provides for the licensure and regulation by the Commissioner of Corporations of persons engaged in, among other activities, the business of receiving money as an agent of the obligor for the purpose of paying bills, invoices, or accounts for the obligor. This law exempts from its requirements a nonprofit community service organization that meets specified requirements, including having consumer credit education and counseling as its principal functions. Under this law, the exemption becomes inoperative upon enactment of a statute requiring licensure and regulation of a nonprofit community organization providing consumer credit counseling.

This bill would require the licensure and regulation by the commissioner of an agency defined as a nonprofit community service organization meeting specified requirements, including having consumer education and credit counseling among its principal functions. The bill would require an agency licensed under its provisions to annually submit a declaration under penalty of perjury affirming its compliance with certain regulatory requirements.

Because perjury is punishable as a criminal offense, the bill would impose a state-mandated local program.

The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.

This bill would provide that no reimbursement is required by this act for a specified reason.

Vote: majority. Appropriation: no. Fiscal committee: yes.  
State-mandated local program: yes.

*The people of the State of California do enact as follows:*

1 SECTION 1. Section 12100 of the Financial Code is  
2 amended to read:

3 12100. This division does not apply to any of the following:

4 (a) Persons or their authorized agents doing business under  
5 license and authority of the Commissioner of Financial  
6 Institutions of the State of California under Division 1  
7 (commencing with Section 99), or under any law of this state or  
8 of the United States relating to banks, trust companies, building  
9 or savings associations, industrial loan companies, personal  
10 property brokers, credit unions, title insurance companies or  
11 underwritten title companies (as defined in Section 12340.5 of  
12 the Insurance Code), escrow agents subject to Division 6  
13 (commencing with Section 17000), or finance lenders subject to  
14 Division 9 (commencing with Section 22000).

15 (b) (1) Any person licensed under Chapter 14A (commencing  
16 with Section 1851) of Division 1 or any agent of that person  
17 when selling any traveler's check (as defined in Section 1852)  
18 that is issued by that person.

19 (2) Any person licensed under Division 16 (commencing with  
20 Section 33000) or any agent of the person, when selling any  
21 payment instrument (as defined in Section 33059) that is issued  
22 by the person.

23 (c) The services of a person licensed to practice law in this  
24 state, when the person renders services in the course of his or her  
25 practice as an attorney-at-law, and the fees and disbursements of  
26 that person whether paid by the debtor or other person, are not  
27 charges or costs and expenses regulated by or subject to the

1 limitations of this chapter; provided, these fees and  
2 disbursements shall not be shared, directly or indirectly with the  
3 prorater or check seller.

4 (d) Any transaction in which money or other property is paid  
5 to a “joint control agent” for disbursal or use in payment of the  
6 cost of labor, materials, services, permits, fees, or other items of  
7 expense incurred in construction of improvements upon real  
8 property.

9 (e) A merchant-owned credit or creditors association, or a  
10 member-owned or member-controlled or member-directed  
11 association whose principal function is that of servicing the  
12 community as a reporting agency.

13 (f) Any person licensed under Chapter 2.5 (commencing with  
14 Section 18895) of Division 8 of the Business and Professions  
15 Code, when acting in any capacity for which he or she is licensed  
16 under that part.

17 (g) Any person licensed under Part 1 (commencing with  
18 Section 10000) of Division 4 of the Business and Professions  
19 Code, when acting in any capacity for which he or she is licensed  
20 under that part.

21 (h) A common law or statutory assignment for the benefit of  
22 creditors or the operation or liquidation of property or a business  
23 enterprise under supervision of a creditor’s committee.

24 (i) The services of a person licensed as a certified public  
25 accountant or a public accountant in this state, when the person  
26 renders services in a course of his or her practice as a certified  
27 public accountant or a public accountant, and the fees and  
28 disbursements of the person, whether paid by the debtor or other  
29 person, are not charges or costs and expenses regulated by or  
30 subject to the limitations of this chapter; provided, these fees and  
31 disbursements shall not be shared, directly or indirectly, with the  
32 prorater or check seller.

33 (j) Any person licensed under Chapter 14 (commencing with  
34 Section 1800) of Division 1 or any agent of that person, when  
35 selling any check or draft that is drawn by the person and that is  
36 of the type described in paragraph (3) of subdivision (a) of  
37 Section 1800.5.

38 (k) Any group of banks each of which is organized under the  
39 laws of a nation other than the United States and one or more of  
40 which are licensed by the Commissioner of Financial Institutions

1 of the State of California under Article 3 (commencing with  
2 Section 1750) of Chapter 13.5 of Division 1, or any agent of that  
3 group, when selling any foreign currency traveler's check (as  
4 defined in Section 1852) issued by that group, provided that each  
5 bank that is a member of the group is jointly and severally liable  
6 to pay the foreign currency traveler's check.

7 (l) Any transaction of the type described in Section 1854.1.

8 (m) Any person licensed under Division 3.5 (commencing  
9 with Section 12500) when performing the functions of an  
10 agency, as defined in Section 12501.

11 SEC. 2. Section 12104 of the Financial Code is repealed.

12 SEC. 3. Division 3.5 (commencing with Section 12500) is  
13 added to the Financial Code, to read:

## 14 DIVISION 3.5. CREDIT COUNSELORS

### 15 CHAPTER 1. GENERAL PROVISIONS

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18  
19 12500. This division is known and may be cited as the Credit  
20 Counselors Law.

21 12501. The following definitions apply for the purposes of  
22 this division:

23 (a) "Agency" means a nonprofit community service  
24 organization that meets all of the following criteria:

25 (1) Is tax exempt under Section 501(c)(3) of the Internal  
26 Revenue Code.

27 (2) Its principal functions are the following:

28 (A) Consumer credit education.

29 (B) Counseling on consumer credit problems and family  
30 budgets.

31 (C) Arranging or administering debt management plans.

32 (D) Arranging or administering debt settlement plans.

33 (3) Limits its board of directors or its membership, or both, to  
34 retailers, lenders in the consumer credit field, educators,  
35 attorneys, social service organizations, employer and employee  
36 organizations, and related groups *with expertise in finance* or that  
37 serve educational, benevolent, fraternal, religious, charitable,  
38 social, or reformatory purposes.

39 (4) Incorporates in this state or any other state as a nonprofit  
40 corporation and operates pursuant to either the Nonprofit Public

Benefit Corporation Law (Part 2 (commencing with Section 5110) of Division 2 of Title 1 of the Corporations Code) or the Nonprofit Mutual Benefit Corporation Law (Part 3 (commencing with Section 7110) of Division 2 of Title 1 of the Corporations Code).

(b) "Commission" means the Department of Corporations.

(c) "Commissioner" means the Commissioner of Corporations.

(d) "Consumer" means an individual who owes money to one or more creditors for personal, family, or household purposes and includes an individual who owes money jointly with one or more other individuals.

(e) "Counselor" means an employee or agent of the agency who designs a debt management plan and provides consumer budget planning, debt counseling, and personal financial education services.

(f) "Debt management plan" or "DMP" means a program whereby an agency agrees to engage in distribution services on behalf of a consumer, or multiple consumers in a joint account situation, with the consumer's creditors and under which the consumer or consumer's agent transfers funds of the consumer or control of those funds to the agency for distribution to the consumer's creditors.

(g) "Debt settlement plan" means a method of paying a debtor's obligations in a negotiated amount to each creditor on a one-time basis.

(h) "Licensee" means a person licensed under this division.

(i) "Person" means any individual, firm, corporation, limited liability company, partnership, association, trust, or legal or commercial entity or group of individuals however organized.

## CHAPTER 2. LICENSING

12510. ~~An agency~~ *A nonprofit community service organization as defined in Section 12501* shall obtain a license from the commission. The application for the license shall include all of the following:

(a) The name and address of the agency. If the agency is a partnership, firm, or association, the application shall state the name and address of each partner or member. If the agency is a

1 corporation or limited liability company, the application shall  
2 state the name and address of each director, officer, member,  
3 registered agent, and principal. If the agency is a business trust,  
4 the application shall state the name and address of each trustee  
5 and beneficiary.

6 (b) The address of each location where the agency will  
7 conduct the business.

8 (c) Audited financial statements for the agency for the most  
9 recent preceding fiscal year. If the agency does not have audited  
10 financial statements, the agency shall submit unaudited financial  
11 statements.

12 (d) Evidence that the agency meets all of the criteria listed in  
13 subdivision (a) of Section 12501.

14 (e) A current copy of the agency's standard DMP agreement.

15 (f) Proof of accreditation through a nationally recognized  
16 accrediting body such as the Council on Accreditation or the  
17 International Standards Organization. If the agency has not had  
18 the opportunity to obtain accreditation, it shall provide proof of  
19 registration with a recognized accrediting body along with a  
20 schedule under which it plans to obtain accreditation. The agency  
21 shall obtain accreditation within six months of the date of its  
22 application.

23 (g) Proof of counselor certification through a nationally  
24 recognized certification body approved by the commissioner.

25 (h) A written notice with the name, address, and telephone  
26 number of the bank, savings bank, savings and loan association,  
27 or credit union where the agency maintains its trust account, the  
28 name in which the account is held, and the account number. The  
29 account information required by this subdivision shall be kept  
30 confidential pursuant to the laws governing disclosure of public  
31 records, including the California Public Records Act, Chapter 3.5  
32 (commencing with Section 6250) of Division 7 of Title 1 of the  
33 Government Code, and the rules adopted thereunder.

34 (i) An irrevocable written consent providing that after  
35 licensure, if the commissioner takes possession of the property  
36 and business of the agency, all books, records, property, and  
37 business, including trust accounts and any other accounts holding  
38 debtors' funds, shall be immediately turned over to the  
39 commissioner or receiver appointed pursuant to this division. The  
40 consent shall be signed by the agency and the bank, savings

1 bank, savings and loan association, or credit union where the  
2 agency maintains its trust account. The consent shall be binding  
3 upon the agency and the financial institution it designated. Any  
4 objection to the consent shall be made pursuant to the laws of  
5 this state in the forum in which the proceeding to take possession  
6 or appointment of the receiver has been filed. The agency and the  
7 financial institution it designated shall further consent to the  
8 jurisdiction of the commissioner for the purpose of any  
9 investigation or proceeding under this division. The consent  
10 required by this subdivision shall include the name, title, and  
11 signature of an official of the financial institution designated by  
12 the agency who is authorized to consent on behalf of the  
13 institution and the name, title, and signature of the chief  
14 executive officer or president of the agency.

15 (j) Payment of ~~a~~ *an annual* nonrefundable application fee of  
16 two hundred dollars (\$200).

17 (k) Other information concerning the financial responsibility,  
18 background, experience, and activities of the agency and the  
19 persons identified in subdivision (a), as the commissioner may  
20 require.

21 12511. The commissioner shall approve or deny an  
22 application for licensure within 60 days after the date of receipt  
23 of an application satisfying the requirements of Section 12510.  
24 The commissioner may extend the 60-day period for 30  
25 additional days. If the commissioner does not act on the  
26 application before the expiration of this period, the application  
27 shall be deemed approved, and the commissioner shall issue a  
28 license to the agency.

29 12512. (a) The commissioner may deny an application for a  
30 license for any of the following reasons:

31 (1) The application is not accompanied by the requisite fee  
32 payment.

33 (2) The application contains information that is materially  
34 erroneous or incomplete.

35 (3) An officer, director, owner, partner, member, or employee  
36 of the agency was convicted of a crime involving the violation of  
37 state or federal securities laws or of a crime involving moral  
38 turpitude or dishonesty, or a civil judgment in a case involving  
39 any of these matters was entered against him or her.

(4) The commissioner finds that the financial responsibility, experience, character, or general fitness of the agency or its officers, directors, owners, partners, members, employees, or agents is not adequate to demonstrate that the agency will be operated in compliance with this division.

(b) Within seven days of denying the application, the commissioner shall inform the applicant in writing of the reasons for the denial. Within 30 days of the date of receipt of the denial, the applicant may request a hearing pursuant to the provisions of Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code.

12513. A license issued pursuant to this division shall remain in force until it has been surrendered, revoked, or suspended. The surrender, revocation, or suspension of a license shall not effect any preexisting legal right or obligation of the licensee.

### CHAPTER 3. REGULATION

12520. The licensee shall maintain and keep current and accurate books, records, and accounts relating to its business in accordance with generally accepted accounting principles and store them in a readily accessible place for a period of not less than five years from the ending date of the fiscal year in which any transaction recorded therein occurred.

12521. The licensee shall deposit any money received from a debtor for its services in a non-interest-bearing trust account in a federally insured state or federal bank, savings bank, savings and loan association, or credit union.

12522. The licensee shall maintain at all times a surety bond in the amount of twenty-five thousand dollars (\$25,000) issued by an insurer licensed in this state. The bond shall be conditioned upon the obligor honestly and faithfully applying all funds received, honestly and faithfully performing all obligations and undertakings required under this division, and paying to the state and to any person all money that becomes due and owing to the state or to any person owed by the obligor of the bond.

12523. The licensee shall not assess a consumer a fee or other charge or receive money from, or on behalf of, a consumer to offset the licensee's actual and necessary expenses except as provided in Section 12531.



1 12524. The licensee shall report all of the following to the  
2 debtor at least once every three months, or upon the debtor's  
3 request, for any debt management plan or debt settlement plan:

- 4 (a) The total amount received from the debtor.
- 5 (b) The total amount paid to each creditor.
- 6 (c) The total amount any creditor has agreed to accept as  
7 payment in full on any debt owed by the debtor.
- 8 (d) Any amount paid to the licensee by the debtor.
- 9 (e) Any amount held in reserve.

10 12525. The licensee shall maintain accreditation by an  
11 independent accrediting organization, including either the  
12 Council on Accreditation or the International Standards  
13 Organization.

14 12526. The licensee shall not engage in any act or practice in  
15 violation of Section 17200 or 17500 of the Business and  
16 Professions Code.

17 12527. The licensee shall adopt and implement on a  
18 continuous basis, policies or procedures of best practices that are  
19 designed to prevent improper debt management or debt  
20 settlement practices and to prevent theft and misappropriation of  
21 funds. Failure to comply with any of the following requirements  
22 shall constitute improper debt management or debt settlement  
23 practices, as applicable:

24 (a) Obtain counselor certification conducted by a nationally  
25 recognized third party certification program that certifies that all  
26 of the licensee's counselors receive proper training and are  
27 qualified to provide financial assistance prior to performing  
28 counseling services in this state.

29 (b) Disburse funds no later than 15 days after receipt of valid  
30 funds, or by a scheduled ~~reimbursement~~ *disbursement* date,  
31 whichever is the longer duration of time.

32 (c) Transmit funds utilizing electronic payment processing  
33 when available.

34 (d) Implement an inception date policy, which shall include an  
35 agreement that a consumer's first disbursement pursuant to a debt  
36 management plan shall be received within six weeks of agreeing  
37 to the debt management plan service. The debt management plan  
38 shall include all items described in Section 12524 and shall be  
39 provided to the consumer prior to the inception date of the plan.  
40 A description of best practices of the licensee and of the

1 consumer complaint resources shall be issued to the consumer  
2 not later than the first payment date.

3 (e) Respond to, and research, any complaint initiated by a  
4 consumer within five business days of receipt of the complaint  
5 and resolve each complaint in a prompt and reasonable manner.

6 (f) Prohibit a policy requiring a debt management plan  
7 consumer to utilize additional ancillary services.

8 (g) Provide access to debt management plan services  
9 regardless of the consumer's ability to pay fees related to the debt  
10 management plan, lack of creditor participation, or the amount of  
11 the consumer's outstanding debt.

12 12528. The licensee shall insert the following statement, in  
13 not less than 10-point type, in its debt management plan and debt  
14 settlement plan agreements:

15 "Complaints related to this agreement may be directed to the  
16 California Department of Corporations. This agency has adopted  
17 best practices for debt management plans and debt settlement  
18 plans, and a copy of this document will be provided to you upon  
19 request."

20 12529. The licensee shall provide written notice to the  
21 commissioner within 30 days of the date of its dissolution or its  
22 termination of the activities for which it is licensed under this  
23 division.

24 12530. The licensee shall submit to the commissioner, at its  
25 expense, an audit report containing audited financial statements  
26 covering the calendar year or the fiscal year, if the licensee has  
27 an established fiscal year. The reports shall be submitted 150  
28 days after the close of the calendar or fiscal year, as applicable.  
29 The licensee shall submit with the annual financial statements a  
30 declaration that conforms to Section 2015.5 of the Code of Civil  
31 Procedure executed by an official authorized by the board of the  
32 licensee stating that the licensee complies with this chapter. The  
33 annual *audited* financial statements shall also include a separate  
34 written statement that identifies the name, address, contact  
35 person, and telephone number for the licensee.

36 12531. (a) The licensee shall receive from a debtor not more  
37 than the following maximum amounts to offset its actual and  
38 necessary expenses for its services:

1 (1) A one-time sum not to exceed ~~\_\_\_\_\_ dollars (\$\_\_\_\_\_)~~ *fifty*  
2 *dollars (\$50)* for education and counseling services combined in  
3 connection with debt management or debt settlement services.

4 (2) A sum not to exceed ~~\_\_\_\_\_ 10~~ percent of the money  
5 disbursed monthly or ~~\_\_\_\_\_ dollars (\$\_\_\_\_\_)~~ *fifty dollars (\$50)* per  
6 month, whichever is less, for debt management plans.

7 (3) A sum not to exceed ~~\_\_\_\_\_ 15~~ percent of the amount of the  
8 debt forgiven for negotiated debt settlement plans.

9 (b) A licensee shall not require any advance payment or  
10 deposit on a debt settlement plan and may require payment of  
11 fees only upon successful settlement of the debt.

12 (c) The fees allowed pursuant to this section shall be the only  
13 fees that a licensee may charge for any services related to a debt  
14 management plan or a debt settlement plan. The commissioner  
15 has the authority to change these fees from time to time to insure  
16 that consumers have continued access to these services.

17 (d) For purposes of this section, a household shall be  
18 considered one debtor.

19  
20 CHAPTER 4. ENFORCEMENT  
21

22 12540. The commissioner may take any of the following  
23 actions at his or her discretion:

24 (a) Make public or private investigations within or outside of  
25 this state necessary to determine whether any person has  
26 violated, or is about to violate, any provision of this division or  
27 any rule or order promulgated pursuant to this division, or to aid  
28 in the enforcement of the law.

29 (b) Make public any information concerning any violation of  
30 this division or any rule or order promulgated pursuant to this  
31 division.

32 12541. (a) For the purpose of any investigation or proceeding  
33 under this division, the commissioner, or any officer designated  
34 by the commissioner, may administer oaths and affirmations,  
35 subpoena witnesses, compel their attendance, take evidence, and  
36 require the production of any books, papers, correspondence,  
37 memoranda, agreements, or other documents or records the  
38 commissioner deems relevant or material to the inquiry.

39 (b) In case of refusal to obey a subpoena issued to a person,  
40 the superior court may upon application by the commissioner,

1 issue to the person an order requiring the person to appear before  
2 the commissioner, or an officer designated by the commissioner,  
3 and produce documentary evidence, if so ordered, or to give  
4 evidence relating to the matter under investigation or in question.  
5 Failure to obey the order of the court may be punished by the  
6 court as contempt.

7 (c) No person is excused from attending or testifying, or from  
8 producing any document or record, before the commissioner in  
9 obedience of a subpoena of the commissioner, or any officer  
10 designated by the commissioner, in any proceeding instituted by  
11 the commissioner on the ground that the testimony or evidence  
12 required of the person may incriminate the person or subject the  
13 person to a penalty or forfeiture. However, after validly claiming  
14 the privilege against self-incrimination, no individual may be  
15 prosecuted or subjected to any penalty or forfeiture for, or on  
16 account of, any transaction, matter, or thing for which the person  
17 is compelled to testify or produce pursuant to this division,  
18 except that the individual testifying is not exempt from  
19 prosecution and punishment for perjury or contempt committed  
20 in testifying.

21 (d) The cost of any review, examination, audit, or  
22 investigation made by the commissioner under this division shall  
23 be paid to the commissioner by the person subject to the review,  
24 examination, audit, or investigation. The commissioner may  
25 maintain an action for the recovery of these costs in any court of  
26 competent jurisdiction. In determining the cost, the commissioner  
27 may use the actual amount of the salary or other compensation  
28 paid to the persons making the review, examination, audit, or  
29 investigation plus the actual amount of expenses, including  
30 overhead reasonably incurred in the performance of the work.

31 12542. (a) Whenever it appears to the commissioner that a  
32 licensee has engaged, or is about to engage, in any act or practice  
33 constituting a violation of this division, or any rule or order  
34 promulgated pursuant to this division, the commissioner may, at  
35 his or her discretion, revoke the license or bring an action in the  
36 name of the people of the State of California in the superior court  
37 to enjoin the acts or practices or to enforce compliance. Upon a  
38 proper showing, a permanent or preliminary injunction, a  
39 restraining order, or a writ of mandate shall be granted and a  
40 receiver or conservator may be appointed.

1 (b) The commissioner, upon learning of a person providing  
2 services in this state without a license required by this division,  
3 shall immediately file an action to require the cessation of those  
4 business operations until the person obtains a license from the  
5 commissioner.

6 12543. (a) If, upon inspection or investigation based upon a  
7 complaint or otherwise, the commissioner has cause to believe  
8 that a person is engaged in business without a license required by  
9 this division, or a person or licensee is violating any provision of  
10 this division or any rule or order promulgated pursuant to this  
11 division, the commissioner may issue a citation to that person or  
12 licensee in writing describing with particularity the basis of the  
13 citation. Each citation may contain an order to desist and refrain  
14 and an assessment of an administrative penalty not to exceed two  
15 thousand five hundred dollars (\$2,500) or, if the violation is  
16 willful, not to exceed ten thousand dollars (\$10,000).

17 (b) If within 30 days from the receipt of the citation, the  
18 person or licensee cited fails to notify the commissioner that he  
19 or she intends to request a hearing, the citation shall be deemed  
20 final. Any hearing under this section shall be conducted in  
21 accordance with Chapter 5 (commencing with Section 11500) of  
22 Part 1 of Division 3 of Title 2 of the Government Code.

23 (c) The sanctions authorized under this section shall be  
24 separate from, and in addition to, all other administrative, civil,  
25 or criminal remedies.

26 12544. In any action brought under this division, the  
27 commissioner is entitled to receive costs, which in the discretion  
28 of the administrative or civil court, shall include an amount  
29 representing reasonable attorney's fees and any related expenses  
30 incurred in the action.

31 12545. The remedies available to the commissioner pursuant  
32 to this chapter are not exclusive and may be sought and  
33 employed in any combination deemed advisable by the  
34 commissioner to enforce the provisions of this division.

35 12546. Any amounts collected by the commissioner in any  
36 action shall be paid into the State Corporations Fund.

37 SEC. 4. No reimbursement is required by this act pursuant to  
38 Section 6 of Article XIII B of the California Constitution because  
39 the only costs that may be incurred by a local agency or school  
40 district will be incurred because this act creates a new crime or

1 infraction, eliminates a crime or infraction, or changes the  
2 penalty for a crime or infraction, within the meaning of Section  
3 17556 of the Government Code, or changes the definition of a  
4 crime within the meaning of Section 6 of Article XIII B of the  
5 California Constitution.

O